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No. 83-1067

In the Supreme Court of the United States

OCTOBER TERM, 1983

BILL MADDOX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITON

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JOHN F. DEPUE
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the district court's denial of petitioner's motion for a continuance due to the illness of his retained counsel deprived him of effective assistance of counsel, even though petitioner was represented at trial by another experienced lawyer who was representing him on closely related charges and assisted by a second lawyer who was thoroughly familiar with the charges in the instant case.

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OPINION BELOW

The order of the court of appeals (Pet. App. 1-2) is reported at 716 F.2d 905 (table).

JURISDICTION

The judgment of the court of appeals was issued on July 13, 1983. A petition for rehearing was denied on September 28, 1983 (Pet. App. 3). On November 25, 1983, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including December 27, 1983 (Pet. App. 4), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Tennessee, petitioner was convicted on 29 counts of possession of marijuana with intent

to distribute, in violation of 21 U.S.C. 841(a)(1), and conspiracy to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846. He was sentenced to concurrent terms totaling 10 years' imprisonment, a $90,000 fine, and a five-year special parole term.[1] The court of appeals affirmed (Pet. App. 1-2).

1. Briefly summarized, testimony of former drug distributors who had operated in the Memphis, Tennessee, area showed that, beginning in the spring of 1980, they would travel to Fort Pierce, Florida, for the purpose of obtaining marijuana for resale. There they would go to the home of co-defendant Donald Raulerson, where they would purchase large quantities of marijuana (sometimes exceeding a ton) from petitioner, Raulerson, and his son, Donnie Raulerson. On some occasions, the purchasers would deal directly with petitioner; on other occasions, petitioner would load and weigh the marijuana, which he stated had been smuggled into the United States from Colombia . See, *e.g.*, Tr. 804, 818-820, 824, 826-827, 831, 843, 1384, 1832-1836, 1880. In addition to the testimony of co-conspirators in the distribution scheme, the government presented video tapes made by an undercover FBI agent who conducted an enterprise in Miami that was ostensibly in the business of laundering the proceeds of illicit drug sales (Tr. 2178). The tapes showed petitioner and his co-defendants transferring a large amount of money in exchange for a cashier's check payable to the executor of a fictitious estate and recorded conversations concerning the disposal of the proceeds of marijuana sales (Tr. 2187-2194, 2239-2244).

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[1]Co-defendant Donald Raulerson also was convicted on 29 substantive marijuana trafficking counts and a conspiracy count. He was sentenced to 13 years' imprisonment, and fines totaling $200,000. Co-defendant Donnie Raulerson was convicted on the conspiracy count and sentenced to three years' imprisonment.

2. Petitioner and his co-defendants were indicted on February 18, 1981. They were arraigned on March 4 and the case was set for trial on April 27, 1981. However, on the motion of petitioner and the co-defendants, the trial date was repeatedly continued: first to June 29, then to August 31, September 28, and finally October 19, 1981. See, *e.g.*, 6/18/81 Tr. 5; 6/26/81 Tr. 15.

On August 10, 1981, a grand jury sitting in the Southern District of Florida indicted petitioner and Donald Raulerson on charges involving the importation of marijuana and money laundering. The charges resulted from the same course of conduct that gave rise to the charges pending in the Western District of Tennessee. See 8/10/81 Tr. 8-9. The trial on the Florida indictment was scheduled for December 14, 1981 (10/16/81 Tr. 7).

From the inception of the instant proceedings, petitioner was represented by James Manire and his associate, James Reed. The two had planned that Manire, an experienced trial attorney, would be the lead counsel at trial and that Reed, who had not previously conducted the defense at a jury trial, would prepare and argue motions and conduct legal and factual analysis. See 10/16/81 Tr. 4-5; 10/19/81 Tr. 10-11. Accordingly, during numerous hearings on pretrial motions, petitioner was represented almost exclusively by Reed. During these hearings, Reed argued, inter alia, that the defense should be permitted the opportunity to interview informants; that several of the charges were multiplicitous; and that, because the Florida and Tennessee indictments involved the "same transaction," trial on both would violate the Double Jeopardy Clause. Additionally, he succeeded in obtaining the exclusion of portions of the video tapes that the government intended to introduce into evidence at trial. See 4/30/81 Tr. 24-25; 8/10/81 Tr. 2, 29-30; 9/18/81 Tr. 7, 24-25, 42-44; 9/30/81 Tr. 248-348.

On Thursday, October 15 — three days before the trial was scheduled to begin — Reed informed the court that Manire had suffered a heart attack, would have to undergo a coronary by-pass operation, and would not be available to participate in a trial for several months (10/16/81 Tr. 6-7). Reed asserted that Manire's illness would preclude his serving as lead counsel; that petitioner objected to proceeding in Manire's absence; and that he (Reed) lacked trial experience. Reed accordingly moved for a continuance or severance of the case from that of the co-defendants (*id.* at 4-6). The district court denied the motion after a hearing on the next day, observing that the case already had been continued repeatedly at the request of petitioner and the co-defendants, that the co-defendants objected to further continuances, and that, because of the pending Florida trial, a continuance of the length necessary to permit Manire's recovery would delay the trial until the following February (*id.* at 12, 20). After suggesting that petitioner make arrangements to obtain another attorney to assist Reed at trial, the court made the following finding (*id.* at 20):

> The records would reflect that Mr. Reed has participated fully, that he has performed certainly more than adequately in respect of the legal motions and the legal positions that have been presented before the court on behalf of [petitioner]. That Mr. Reed is fully and entirely cognizant of the details and the circumstances and the only basis that the court has any real problem about it is Mr. Reed's proper and appropriate assertion to the court that he has not had the experience before in jury trials.

The court also invited petitioner to renew the motions during trial in the event that he found a concrete need for a continuance or severance and stated that, in the event of petitioner's conviction, it would grant a new trial if it appeared that he was prejudiced by denial of the motions (*id.* at 18-19).

On October 19, 1981, Edward O'Donnell, an experienced Florida trial attorney who specialized in defending drug cases, appeared on petitioner's behalf (10/19/81 Tr. 7, 22). After introducing himself as the attorney representing petitioner in the "related case in Florida," O'Donnell requested a two-week continuance for the purpose of preparing to defend petitioner (*id.* at 12, 14). The court denied the request, observing that O'Donnell would be familiar with the evidence in the case, and particularly the video tapes, as the result of his representation of petitioner in Florida (*id.* at 31-33). However, to assure O'Donnell adequate preparation time, the court stated that it would permit him to cross-examine the government's witnesses last of the three defense attorneys or to recall them after they had completed their testimony, and also that he could delay making an opening statement until the beginning of petitioner's case (*id.* at 34-35). Preliminary matters and the government's opening argument thereafter consumed the entire first week of trial, and there was no cross-examination of any government witness until Wednesday of the second week of trial (Tr. 38-689, 800, 1190). Reed served as co-counsel throughout the trial proceedings.

Following petitioner's conviction, neither O'Donnell nor Reed moved for a new trial on the ground that they were impeded in their ability to afford petitioner adequate representation due to the denial of the continuance motions. Instead, on direct appeal, O'Donnell argued that, even absent a showing of prejudice, refusal to grant the continuance resulted in the denial of effective assistance of counsel and required reversal of the conviction (Br. 5-13). The court below summarily rejected this claim, noting in addition that "the evidence in this case * * * constituted overwhelming support for the jury's guilty verdict" (Pet. App. 1).

ARGUMENT

Petitioner contends (Pet. 4-10) that denial of his motion for a fifth continuance, sought because of the illness of lead trial counsel, constituted a denial of his Sixth Amendment right to effective assistance of counsel and requires reversal of his conviction even without a showing of prejudice. This claim is clearly without merit.

As this Court recently observed in *Morris* v. *Slappy*, No. 81-1095 (Apr. 20, 1983), slip op. 9-10 (citations omitted):

> Not every restriction on counsel's time or opportunity to investigate or to consult with his client or otherwise to prepare for trial violates a defendant's Sixth Amendment right to counsel. Trial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons. Consequently, broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary "insistence upon expeditiousness in the face of a justifiable request for delay" violates the right to assistance of counsel.

See also *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964); *United States* v. *Phillips*, 640 F.2d 87, 92-93 (7th Cir.), cert. denied, 451 U.S. 991 (1981).

In this case, the district court's denial of a continuance did not constitute "an unreasoning and arbitrary 'insistence upon expeditiousness' " (*Morris* v. *Slappy*, slip op. 9-10 (quoting *Ungar* v. *Sarafite*, 376 U.S. at 589)). Reed, who acted as co-counsel throughout the trial, had been closely involved with the case since the return of the indictment and was fully conversant with the facts and pertinent law. Any

lack of trial experience on his part[2] was offset by the appearance of O'Donnell, a seasoned trial attorney who also was conversant with the petitioner's circumstances due to his representation of petitioner on the related Florida charges. Additionally, the trial court made special provisions to assure that O'Donnell had adequate preparation time by permitting him to defer cross-examination of government witnesses and presentation of his opening argument.[3] Indeed, due to the length of the preliminary stages of the trial, the government's presentation of its case did not begin until 10 days after the court denied O'Donnell's request for a continance (Tr. 800).

Moreover, the court previously had granted continuances at the request of petitioner and his co-defendants that resulted in the delay of the trial from April until October 1981. The additional continuance of two weeks requested by O'Donnell might well have had the practical effect of further delaying the trial for approximately three months, due to the proceeding's anticipated length and the scheduled commencement of petitioner's trial in Florida on December 14 (10/19/81 Tr. 32-33). In view of these factors and protections, denial of the continuance motion was a proper exercise of the court's broad discretion.

Moreover, as the Court held in *Avery* v. *Alabama*, 308 U.S. 444, 446 (1940), "[s]ince the Constitution nowhere specifies any period which must intervene between the

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[2]Of course, lack of trial experience, standing alone, does not constitute a basis for a claim of ineffective assistance of counsel. U.S. Br. at 39-41, U.S. Reply Br. at 3-5, *United States* v. *Cronic*, No. 82-660 (argued Jan. 10, 1984). See, *e.g.*, *United States* v. *Badolato*, 701 F.2d 915, 926 (11th Cir. 1983); *Harris* v. *Housewright*, 697 F.2d 202, 205 (8th Cir. 1982); *United States* v. *Easter*, 539 F.2d 663, 666 (8th Cir. 1976), cert. denied, 434 U.S. 844 (1977).

[3]O'Donnell nevertheless chose to make his opening statement at the outset (Tr. 755).

required appointment of counsel and trial, the fact, standing alone, that a continuance has been denied does not constitute a denial of the constitutional right to assistance of counsel." The Court therefore has refused to fashion the per se rule suggested by petitioner "requiring reversal of every conviction following tardy appointment of counsel" (*Chambers* v. *Maroney*, 399 U.S. 42, 53-54 (1970)), and it has made clear that a defendant presenting such a claim is not entitled to relief absent a showing of prejudice as the result of the timing of the substitution of counsel and trial. *Ibid.* See also *Avery* v. *Alabama*, 308 U.S. at 450. In this case, petitioner's counsel were specifically invited by the district court to present in a post-trial motion any claims they might have relating to inadequate representation due to insufficient preparation time, but they did not do so. Instead, petitioner merely claimed on appeal that denial of the motion was prejudicial per se and that reversal of his conviction was required. Absent any showing whatsoever of specific prejudice, however, petitioner is not entitled to relief. See *Chambers* v. *Maroney*, 399 U.S. at 53-54. See also U.S. Br. at 33-34 & App. 7a-10a, *United States* v. *Cronic*, No. 82-660 (argued Jan. 10, 1984).[4]

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[4]We have furnished petitioner with copies of our briefs in *Cronic*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JOHN F. DEPUE
Attorney

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